essence of the contract ... ... The nature of the contract or of its subject matter was such that it would be wrong to draw an inference that time was of the essence, nor is there any evidence of any attendant or surrounding circumstances from which it can be gathered that it was so. If there were any evidence that it was within the contemplation of the parties that the roads were required for a specific purpose and it was imperative that they should be ready by 30th May, 1960, it would be logical to draw an inference in favour of the defendant". With this view of the learned Judge I respectfully agree. From the evidence of the Assistant District Officer there was no urgency for the completion of the road. On receipt of letter Ex. P 2, respondent sent a letter to the appellant asking for another ten days to complete the work, the delay for the completion being due to high tides and rainy weather. No extension of time was granted and no notice was given to the respondent to complete by a certain date. Had notice been given to the respondent to complete by a certain date then time could have been of the essence of the contract. See *Stickney* v. *Keeble* [1]; *Yeow Kim Pong Realty Ltd.* v. *Ng Kim Pong* [2].

Regarding the doctrine of *quantum meruit* it was contended by the counsel for the appellant that no claim could be made on it. He stated that the respondent would not be entitled to more than the contract price of $5,280 less the sum of $4,750 expended by respondent to complete the work, i.e. $530 only. He quoted the case of *H. Dakin & Co. Ltd.* v. *Lee* [3] in which there was a contract to do a considerable amount of work to the defendant's house. What the respondent had done was to perform and complete the work which they had contracted to do, but they had done some part of it insufficiently and badly and it was held that the respondent were entitled to be paid but the appellant could deduct such an amount as was sufficient to put that insufficiently done work into the condition in which it ought to have been according to the contract.

The learned Judge came to the conclusion that the respondent's claim should be decided on the basis of *quantum meruit*. He referred to the case of *Planche* v. *Colburn* [4] where the appellant engaged plaintiff to write a treatise for a periodical publication. Plaintiff commenced the treatise, but before he had completed it, the defendants abandoned the periodical publication. *Held*, that respondent might sue for compensation, without tendering or delivering the treatise. I respectfully agree with the trial Judge's views as expressed in his judgment. In *Smith Construction Co. Ltd.* v. *Phit Kirivatna* [5] Spenser Wilkinson J. referred to the unreported case of *Lysaght* v. *Pearson* which was referred to in *Sumpter* v. *Hedges* [6]. He quoted the words of A. L. Smith L.J.:—

> "There the plaintiff had contracted to erect on the defendant's land two corrugated iron roofs. When he had completed one of them, he does not seem to have said that he abandoned the contract, but merely that he would not go on unless the defendant paid him for what he had already done. The defendant thereupon proceeded to erect for himself the second roof. The Court of Appeal held that there was in that case something from which a new contract might be inferred to pay for the work done by the plaintiff."

The present case is distinguished from *Dakin's* case in that the appellant repudiated the contract before the work was completed without giving notice to the respondent to complete by a certain date. Indeed he immediately engaged another contractor to complete the work. The respondent applied for an extension of time to complete which was not granted. From all the circumstances, I am of opinion that there must in this case be an implied contract on the part of the appellant to pay for the work done and therefore the respondent is entitled to recover the full amount of the work and labour done and material supplied. In his judgment the trial Judge has carefully considered the case in every aspect and in my view he has come to the right conclusion. I would therefore dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *R. P. S. Rajasooria; Eugene Lye & Hoh.*

PAY ENG KEE v. RAMASAMY

[C.A. (Wee Chong Jin C.J., Tan Ah Tah and Buttrose JJ.) March 27, 1963]

[Singapore — Civil Appeal No. 3 of 1963]

Damages — Measure of damages — Service pension — Exclusion in assessment.

Practice and Procedure — Assessment of damages in negligence cases — Counsel agreeing on law — Precedent not followed since judgment — Appeal — Whether point open to appellant.

In an action which concluded on November 6, 1962 for damages for injuries sustained in an accident, counsel for both the plaintiff and the defendant agreed that in the assessment of damages, a pension received by the plaintiff as a result of the accident was not to be taken into account. The agreement was apparently reached in the light of the existing state of the law as declared in *Payne* v. *Railway Executive* [2]. On November 20, 1962, *Payne's* case was not followed by the English Court of Appeal in *Browning* v. *War Office* [1]. The defendant appealed on the ground that by reason of the decision in *Browning's* case, the pension receivable by the plaintiff ought to be taken into consideration in reduction of the quantum of damages awarded to him.

Held: *Payne's* case was not a binding authority in Singapore and as no attempt was made to argue against its correctness, the point should not be allowed to be argued on appeal.

Cases referred to:—

(1) *Browning v. War Office* [1962] 3 All E.R. 1089.

(2) *Payne* v. *Railway Executive* [1951] 2 All E.R. 910.

COURT OF APPEAL.

K. E. Hilborne for the appellant.

Denis Murphy for the respondent.

Tan Ah Tah J. (with whom **Wee Chong Jin C.J.** and **Buttrose J.** agreed): On the 5th August, 1961 the plaintiff, who was a Government employee, was riding his bicycle along Bukit Timah Road when he was involved in a collision with a motor-car driven by the defendant. He sustained injuries as a result of the collision and brought an action against the defendant in the High Court claiming damages for negligence. At the conclusion of the trial on the 6th November, 1962, the learned trial judge found that the defendant was solely to blame for the accident and awarded the plaintiff the sum of $9,794.85 by way of damages. The plaintiff had been boarded out on medical grounds with effect from the 7th July, 1962 and was thereafter in receipt of a pension from the Government. In assessing the damages the learned trial judge did not take the plaintiff's pension into account. It is important to note that the reason why he did not do so was because counsel on both sides agreed that the pension was not to be taken into account in assessing the damages.

On the 20th November, 1962 the case of *Browning* v. *War Office* [1] was decided by the English Court of Appeal. The judgments delivered in that case caused counsel for the defendant to think that he had been in error in agreeing to the damages being assessed in the manner indicated. The defendant now appeals to this court and contends that by reason of the decision in *Browning's* case, *supra*, the pension receivable by the plaintiff from the time of his retirement ought to be taken into consideration in reduction of the quantum of damages awarded to him.

Counsel for the defendant stated that in agreeing to the method whereby the damages were assessed he was relying on the decision of the English Court of Appeal in *Payne* v. *Railway Executive* [2], the headnote of which reads as follows:

"The plaintiff, while serving in the Royal Navy, was seriously injured in a railway accident for which the defendants admitted liability. He was invalided from the service and was awarded a disability pension in assessing the amount of which the Minister of Pensions had power to take into account the amount of compensation awarded to the plaintiff aliunde. Later the plaintiff sued the defendants for damages for negligence and was awarded £3,000 for the loss of future earnings and £2,500 for pain and suffering.

Held: in assessing damages attributable to loss of earnings the amount of the disability pension must be disregarded."

In *Browning's* case, *supra*, the English Court of Appeal came to the conclusion, by a majority, that *Payne's* case, *supra*, should not be followed. The disability pension known as veteran's benefit to which the plaintiff in *Browning's* case was entitled as of right was therefore taken into account and credit was given for it in assessing the pecuniary loss for which the plaintiff was to be compensated.

It now becomes necessary to consider the legal position at the time of the trial in the court below. *Payne's* case, *supra*, was not a binding authority in Singapore. Moreover, the question whether or not pensions were to be taken into account in assessing damages was, to say the least, an arguable one. That this was so is borne out by the judgments in *Browning's* case, *supra*. However, in spite of the fact that the point was an arguable one, counsel for the defendant made no attempt to argue it; instead, he chose to agree that the damages should be assessed on the basis that the pension received and receivable by the plaintiff from the time of his retirement should not be taken into account. The damages were accordingly assessed by the learned trial judge on that basis. In the circumstances of this particular case, having regard to what transpired in the court below, it would not be right, in my opinion, to allow the point to be argued in this court.

In view of the conclusion which I have reached, it is unnecessary to express any opinion as to whether *Payne's* case, *supra*, or *Browning's* case, *supra*, should be followed by this court.

For the reasons which I have stated the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Hilborne, Chung & Co.; Murphy & Dunbar.*